

**GOOGLE LLC'S MOTION  
IN LIMINE NO. 1 TO  
EXCLUDE EVIDENCE  
AND ARGUMENT  
REGARDING  
SANCTIONS ORDERS,  
SANCTIONS  
PROCEEDINGS, AND  
PURPORTED  
DISCOVERY  
MISCONDUCT**

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

CHASOM BROWN, *et al.*, individually and  
on behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**GOOGLE LLC'S MOTION *IN LIMINE*  
NO. 1 TO EXCLUDE EVIDENCE AND  
ARGUMENT REGARDING  
SANCTIONS ORDERS, SANCTIONS  
PROCEEDINGS, AND PURPORTED  
DISCOVERY MISCONDUCT**

Hon. Yvonne Gonzalez Rogers

Trial Date: January 29, 2024

1 **I. INTRODUCTION**

2 Plaintiffs’ recent filings, and disclosure of new opinions from their retained expert Jonathan  
 3 Hochman, make clear their intent to present evidence and argument at trial concerning (i) their  
 4 allegations that Google failed to disclose relevant information in discovery; and (ii) the sanctions  
 5 proceedings and orders.<sup>1</sup> But Plaintiffs should not be permitted to relitigate a conclusively resolved  
 6 dispute before the jury. Magistrate Judge van Keulen has already considered Plaintiffs’ misconduct  
 7 allegations at length, assessed the prejudice to Plaintiffs, and ordered narrow, targeted relief to cure  
 8 that prejudice. Those orders set forth precisely what (if any) information may be disclosed to the  
 9 jury concerning these discovery skirmishes. Any other references to sanctions or Google’s purported  
 10 discovery misconduct would be irrelevant, unfairly prejudicial, confusing, and likely to waste  
 11 valuable trial time. Google respectfully requests that the Court exclude them entirely. *See generally*  
 12 *Fed. R. Evid.* 402, 403.

13 **II. BACKGROUND**

14 The sanctions proceedings arose from Plaintiffs’ claim that Google failed to identify and  
 15 disclose certain log fields intended to approximate aggregate Incognito traffic, logs containing those  
 16 fields, and related witnesses, until after the close of discovery. *See, e.g.*, Dkt. 588 at PDF pp. 39–42;  
 17 Dkt. 898 at PDF pp. 9–10. Judge van Keulen presided over two hearings concerning this conduct,  
 18 reviewed hundreds of pages of briefing, exhibits, and expert materials, and heard live testimony  
 19 from five witnesses. *See, e.g.*, Dkt 588 at PDF p. 2 (procedural history of first proceeding); Dkt. 898  
 20 at PDF pp. 3–4 (same for second proceeding). The relevance of the late-disclosed materials,  
 21 associated prejudice to Plaintiffs, and nature of appropriate relief were all hotly contested and  
 22 adjudicated. *Id.* Following these proceedings, Judge van Keulen issued orders granting certain  
 23 targeted sanctions (and denying many others) to address the prejudice from the alleged misconduct.

24  
 25 <sup>1</sup> *See, e.g.*, Dkt. 933-3 at 30 (PAF 4) (listing “Google was sanctioned” as a “material fact”); Dkt.  
 26 924-3 (MSJ opposition arguing that “a reasonable jury could readily find [for Plaintiffs], particularly  
 27 where . . . Google has been sanctioned for concealing how it tracks, stores, and uses the data.”);  
 28 Dkt. 986-2, ¶¶ 1–2, 19–22, 23, 34–37, 46, 48 (Hochman report offering opinions as to sanctions and  
 alleged discovery misconduct); Dkt. 986 at 1, 5 (suggesting Mr. Hochman will tell jury allegedly  
 withheld evidence “would have been unfavorable”).

1 Dkt. 588; Dkt. 898. Notably, the orders expressly rejected Plaintiffs’ arguments that Google  
 2 concealed any evidence or otherwise acted in bad faith.<sup>2</sup>

3 The orders denied Plaintiffs’ requests for fact-establishment and adverse-inference  
 4 instructions, ruling that their proposed relief “would be more than necessary to address the prejudice  
 5 suffered by Plaintiffs.” Dkt. 898 at PDF p. 12–13; *id.* at PDF pp. 11–12 (rejecting adverse instruction  
 6 as unsupported); Dkt. 588 at PDF p. 50, ¶ 35 (Plaintiffs’ requested preclusion “not warranted under  
 7 the facts of this case”). And after carefully considering whether *any* aspect of Google’s discovery  
 8 conduct should be disclosed to the jury, the orders provided that “[i]f [Judge Gonzalez Rogers]  
 9 determine[s] that Google’s discovery misconduct is relevant to any issue before the jury,” the Court  
 10 could instruct that “Google failed to timely disclose” certain witnesses, data sources, and a data  
 11 field.<sup>3</sup> Dkt. 898 at PDF pp. 13–14.

### 12 **III. ARGUMENT**

#### 13 **A. Plaintiffs’ Misconduct Allegations and the Related Sanctions Proceedings Are 14 Not Relevant to Any Issue at Trial**

15 Reference to discovery conduct or the sanctions proceedings has no “tendency to make a  
 16 [material] fact any more . . . probable than it would be without th[at] evidence.” Fed. R. Evid. 401.  
 17 Plaintiffs’ case is about whether Google “collect[ed] . . . user data while users are in ‘private  
 18 browsing mode’ . . . without disclosure or consent,” Dkt. 886 (FAC) at ¶ 1, not whether Google  
 19 timely disclosed every potentially relevant witness, log, and field. That Google receives data related  
 20 to private browsing is undisputed, *see, e.g.*, Dkt. 798-2 (Google’s Nov. 6, 2020 Resp. to RFA No.  
 21 1), and the Court has already ruled that the “‘sanctions orders’ . . . have nothing to do with” Google’s  
 22 disclosures or Plaintiffs’ consent. Dkt. 969 at 14 n.16. Even if the late-disclosed *evidence* were

23 <sup>2</sup> *See, e.g.*, Dkt. 588 at PDF p. 52, ¶ 45 (“Plaintiffs’ requested jury instruction that ‘Google concealed  
 24 and altered evidence . . .’ is not warranted or appropriate on the facts of this case.”); *id.* at PDF p. 58,  
 25 ¶ 72 (“Plaintiffs have failed to carry their burden of showing that Google’s failures . . . resulted from  
 26 either bad faith or recklessness with an improper purpose.”).

27 <sup>3</sup> The March 2023 order added that although it might be appropriate to instruct the jury that it “may  
 28 infer from Google’s failure to disclose these data sources that they are not *helpful* to Google,” the  
 record “does *not* support an inference that the late-disclosed information was *unfavorable* to  
 Google.” *Id.* at PDF pp. 11–12 (emphases added). In other words, the order expressly ruled that  
 Plaintiffs should not get the benefit of the doubt from the late-disclosed data sources.

1 relevant to any issue before the jury—and Judge van Keulen has indicated otherwise<sup>4</sup>—the  
 2 *circumstances* of its disclosure are not. *See M.H. v. County of Alameda*, 2015 WL 894758 (N.D.  
 3 Cal. Jan. 2, 2015) (precluding references to purported failure to produce discovery because “[p]re-  
 4 trial discovery conduct—as opposed to the materials actually produced in discovery—is usually  
 5 irrelevant to a jury’s consideration of the facts.”).

6 Plaintiffs’ misconduct allegations are particularly irrelevant because the Court has long ago  
 7 cured any prejudice resulting from Google’s conduct. *See generally* Dkt. 588; Dkt. 898. Where a  
 8 court has already re-leveled the playing field, “[t]here is no need to relitigate [the subject of its  
 9 sanctions order] and ‘explain the foundational facts to the jury on an issue the Court has already  
 10 decided.’” *Zucchella v. Olympusat, Inc.*, 2023 WL 2628107, at \*8 (C.D. Cal. Jan. 10, 2023)  
 11 (excluding testimony as “duplicative and irrelevant in light of its sanctions order”).

12 **B. References to Sanctions or Alleged Discovery Misconduct Would Be Unduly**  
 13 **Prejudicial, Confusing, and a Waste of Time**

14 Even if Google’s discovery conduct *were* relevant to any issue before the jury, any such  
 15 relevance would be outweighed by the risk of unfair prejudice to Google. Juries are highly  
 16 susceptible to suggestions that “a party [is] responsible for cloaking something.” *Pavemetrics Sys.,*  
 17 *Inc. v. Tetra Tech, Inc.*, 2023 WL 1836331, at \*4 (C.D. Cal. Jan. 23, 2023) (ordering new trial where  
 18 “counsel . . . made [] improper statements suggesting [the opposing party] had something to hide”).

19 The risk of undue prejudice is particularly acute here. Plaintiffs have routinely  
 20 mischaracterized Google’s discovery conduct and the sanctions orders before the Court. *See, e.g.,*  
 21 Dkt. 969 (MSJ Ord.) at 14 n.16 (criticizing Plaintiffs’ “gamesmanship” in “mischaracteriz[ing] the  
 22 sanctions orders”); *see also* Dkt. 934 at 11 n.15. And Plaintiffs’ pretrial submissions make clear that  
 23 they intend to continue referencing discovery conduct in a false and prejudicial way—including by  
 24 accusing Google of “concealing” evidence and speculating about what additional discovery (which  
 25

26 <sup>4</sup> The March 2022 sanctions order held that “Google’s discovery misconduct is primarily related to  
 27 issues to be decided by the Court” and expressed doubt that it is “relevant to issues for the jury.”  
 28 Dkt. 588 at PDF pp. 51–52, ¶ 44. The March 2023 order reaffirmed that the alleged misconduct may  
 not be “relevant to an issue before the jury.” *See* Dkt. 898 at PDF p. 13.

1 they did not seek, and Judge van Keulen did not grant, *see* Dkt. 898 at 17) might have shown.<sup>5</sup>  
 2 Plaintiffs should not be permitted to grant themselves an adverse inference the Court already denied  
 3 by distorting the scope of Google’s misconduct before the jury. The detailed sanctions orders leave  
 4 it to the Court, not Plaintiffs, to control whether and how the jury hears about alleged misconduct.  
 5 *Cf. Edwards Lifesciences Corp. v. Meril Life Sciences Pvt. Ltd.*, 2022 WL 254348 (N.D. Cal. 2022)  
 6 (“If Meril engaged in discovery misconduct, then that can and will be addressed by this Court. But  
 7 the Court will not allow this discovery dispute to continue to play out in front of the jury.”)

8 In addition to prejudicing Google, allowing Plaintiffs to discuss pretrial discovery conduct  
 9 would confuse the issues before the jury and waste limited trial time. If Plaintiffs could relitigate  
 10 the adequacy of Google’s disclosures and speculate about what else they might have learned with  
 11 more discovery—issues squarely addressed by the sanctions orders—Google would be forced to  
 12 temper the prejudice by contextualizing and defending its conduct. This inevitable trial-within-a-  
 13 trial about a side issue in discovery would both confuse jurors about what claims are actually at  
 14 issue, and reduce the time they have available to understand and resolve those claims. *See Wyatt*  
 15 *Tech. Corp. v. Malvern Instruments, Inc.*, 2010 WL 1150568, at \*16 (C.D. Cal. Jan. 25, 2010) (“A  
 16 trial is not the appropriate forum in which to air [discovery disputes].”) Indeed, even with the benefit  
 17 of voluminous briefing, sanctions issues consumed *more than 9 hours* of hearing time. The parties  
 18 cannot afford to waste so much of the anticipated two-week trial on issues that have no bearing on  
 19 the merits and are already decided.

#### 20 **IV. CONCLUSION**

21 For the foregoing reasons, the Court should exclude any evidence and argument regarding  
 22 the sanctions orders, sanctions proceedings, or alleged discovery misconduct.

23 <sup>5</sup> *See, e.g.*, Dkt. 986-2 (Hochman 2d Supp. Rep.) ¶ 23 (“Google was sanctioned for concealing its  
 24 use of private browsing detection bits”); *id.* ¶ 34 (“Google’s concealment of its Incognito detection  
 25 practices . . . leads me to question what other information Google has from discovery.”); *id.* ¶ 48  
 26 (“Google was twice sanctioned for concealing the full scope of these practices, and . . . still refuses  
 27 to provide complete discovery”); *id.* ¶ 41 (“Because of Google’s untimely disclosure of these [REDACTED]  
 28 logs, and Google’s refusal to conduct a comprehensive investigation, we do not know the full extent  
 of Google’s storage and use of private browsing data.”); Dkt. 986 at 4–5 (suggesting Plaintiffs intend  
 to use expert testimony to enhance the effect of the carefully circumscribed jury instruction, which  
 they mischaracterize (*see supra* note 3) as an adverse inference).

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